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SUPREME COURT  
OF THE STATE OF WASHINGTON

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GEORGE KELLEY, as guardian for BB, PB, and NB, minor children,

Respondents,

vs.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Petitioner.

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ANSWER TO PETITION FOR REVIEW

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## TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF ISSUE RAISED IN PETITION	2
III.	STATEMENT OF THE CASE	2
IV.	ARGUMENT	5
V.	CONCLUSION	7

## TABLE OF AUTHORITIES

### Cases

<i>Kelley v. Centennial Contractors Enterprises, Inc.</i> , __ Wn. App. __, 194 P.3d 292 (Oct. 28, 2008) .....	2, 4, 6
<i>Ueland v. Reynolds Metals Co.</i> , 103 Wn.2d 131, 691 P.2d 190 (1984) .....	1, 2, 5, 6

### Statutes and Other Authorities

RAP 13.4 .....	1, 5, 7
RCW 4.08.050 .....	6

## I. INTRODUCTION

Centennial Contractors Enterprises, Inc. (“Centennial”) asks this Court to accept review arguing that the Court of Appeals erred in determining that there was a question of fact regarding whether it was unfeasible to join the Blackshear Children’s claims with that of their parents under the specific circumstances of this case. Citing RAP 13.4(b)(1), Centennial seeks review asserting that the Court of Appeals decision is in conflict with this Court’s decision in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984).

Contrary to Centennial’s argument, the decision by the Court of Appeals is consistent with *Ueland*. There, this Court held that a minor’s claim for loss of consortium should be joined with the claim of the parent unless it is unfeasible. 103 Wn.2d at 137. Here, the Court of Appeals simply applied this rule of law to the particular facts of this case where: (1) a surgery at the time of the father’s trial created the need to assert a claim for loss of consortium by the children; (2) the family’s financial condition changed necessitating the claim; and (3) a guardian ad litem was appointed only after the father’s trial. Because the Court of Appeals’ decision is consistent with *Ueland*, this Court should deny Centennial’s Petition for Review.

## II. RESTATEMENT OF ISSUE RAISED IN PETITION

Whether the decision below, *Kelley v. Centennial Contractors Enterprises, Inc.*, \_\_ Wn. App. \_\_, 194 P.3d 292 (Oct. 28, 2008) is in conflict with *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984) when the Court of Appeals determined that there were questions of fact regarding whether it was unfeasible to join the Blackshear Children's claims for loss of consortium with those of the parents considering the need for the minors' lawsuit became apparent only at the time of the father's trial and the minors were not represented by a guardian ad litem until after the father's trial.

## III. STATEMENT OF THE CASE

On April 7, 2003, Phillip Blackshear was transporting a load of steel beams and was injured when a forklift operator lost control of a beam which landed on Mr. Blackshear. CP 12. This beam fell off the forklift, struck Mr. Blackshear in the right leg, and pinned him against a stack of previously unloaded beams. *Id.*

On March 29, 2004, Mr. Blackshear and his wife filed suit in Pierce County Superior Court against Centennial for damages resulting from the accident. CP 10–13. Trial was originally set for March 28, 2005. CP 17. However, because of court congestion, the trial was rescheduled to September 6, 2005. CP 7. Although the trial did not start on the date set,

it did eventually begin on September 12, 2005 and resulted in an award for Mr. Blackshear. *Id.*

After the initial trauma from the incident subsided, Mr. Blackshear continued to experience discomfort, underwent several medical procedures, but was able to interact with his wife and children. CP 6, 63. However, as time progressed, it became clear that the back pain Mr. Blackshear was suffering from would require lumbar fusion surgery. CP 62. On September 8, 2005, just four days prior to the commencement of his trial, Mr. Blackshear underwent back surgery. CP 63. The initial observations were that the surgical procedure successfully relieved the pain suffered by Mr. Blackshear. *Id.* However, after a few months of recovery, it became clear that the surgery was not successful. *Id.* In fact, after the surgery, Mr. Blackshear's condition was such that he could not financially or emotionally care for his family. *Id.*

Respondents in this case are the three minor children of Mr. Blackshear – Brittney Blackshear, Phillip Blackshear, Jr., and Nicholas Blackshear. CP 71. Phillip Blackshear, Jr., has childhood rheumatoid arthritis that requires 24-hour care and supervision. After Mr. Blackshear's back surgery, he was no longer able to provide this care for his son. CP 63.

On April 6, 2006, the Blackshear children, filed suit in Pierce County Superior Court against Centennial for loss of consortium. CP 7.

George Kelley's appointment as guardian ad litem was confirmed by an Order entered May 8, 2006. CP 98.

After the lawsuit was filed, Centennial moved for summary judgment on the basis that the Blackshear Children "may not bring a separate consortium claim unless he or she can show why joinder with the parents' underlying claim was not feasible." CP 46. On February 21, 2007, the trial court granted Centennial's motion and dismissed the children's claims. CP 87.

The Blackshear Children appealed, and on October 28, 2008, the Court of Appeals reversed the trial court and issued an opinion remanding the matter for trial. Specifically, the Court of Appeals concluded that there were questions of fact presented in this case as to whether the joinder of the children's claims with that of Mr. Blackshear was feasible. *Kelley*, 194 P.3d at 296. The Court reached this decision for two reasons. First, viewing the evidence in the light most favorable to the Blackshear Children, the need to file suit for loss of consortium only arose after Mr. Blackshear's September 2005 back surgery because after this procedure Mr. Blackshear was unable to provide for his family financially and emotionally. *Id.* Second, the Blackshear Children were not represented by a guardian until after Mr. Blackshear's trial, and therefore, they were not legally able to pursue or evaluate whether they had a claim to pursue until after the September surgery. *Id.* After the Court of

Appeals issued its opinion, Centennial filed the Petition for Review, which is currently pending before this Court.

#### IV. ARGUMENT

Through its Petition for Review, Centennial fails to establish that any of the grounds set forth in RAP 13.4(b) are present and would justify review by this Court. Centennial relies only on RAP 13.4(b)(1) in seeking review. Therefore, the other three grounds for this Court to grant review are not at issue and are not addressed in this brief. Because the decision of the Court of Appeals is not in conflict with *Ueland*, this Court should not accept review.

In *Ueland*, this Court recognized a child's cause of action for loss of parental consortium, which is separate from the parent's underlying tort claim. 103 Wn.2d at 135-36. In reaching this holding, the *Ueland* Court noted the need to protect children and reasoned that while "a monetary award will not enable a child to regain the loss of a parent's love, companionship, and guidance . . . such an award may enable the child to lessen the impact of the loss." *Id.* at 139. While recognizing this cause of action, the court also acknowledged a concern about the possibility of multiple lawsuits, and therefore, added a condition that the child join with the parent's tort claim "unless he or she can show why joinder with the parent's underlying claim was not feasible." *Id.* at 137.



Here, the Court of Appeals simply applied the *Ueland* holding to the specific facts of the Blackshear Children's case. Viewing the evidence in the light most favorable to the Blackshear Children, the Court of Appeals framed the question as whether it was feasible, as a matter of law, to have the Blackshear Children join in their parents' claim when:

Trial began on September 12, 2005, and [Mr. Blackshear] did not undergo surgery until just four (4) days prior to trial. Only after recuperating from surgery and allowing for recovery time, which meant some time after the adjudication of [Mr. Blackshear]'s case, was it finally known that the surgery was unsuccessful and [Mr. Blackshear] was rendered permanently disabled. Had the Blackshear children brought suit with their parents' claims, there simply was not enough factual evidence to support a favorable finding or award, let alone enough to defend a motion for summary judgment that would have likely been brought by [Centennial].

*Kelley*, 194 P.3d at 296. Aside from the outcome of the surgery, the family also faced new economic hardships that were not present when the parents' lawsuit was filed. *Id.* at 297. The Court of Appeal also observed that "no one appeared as guardian or GAL for the children in the parents' suit and that it was not until May 8, 2006, well after the parents' trial was completed, that Kelley was appointed GAL for the children." *Id.* at 296. As required by RCW 4.08.050, the Blackshear Children could not have joined the lawsuit without a guardian. *Id.* Based on these particular facts, the Court of Appeals determined that it was improper to dismiss the Blackshear Children's claims as a matter of law.

The decision by the Court of Appeals in this case is consistent with *Ueland*. Centennial has not established that the decision is in conflict with a holding from this Court. Therefore, RAP 13.4(b)(1) does not apply and this Court should deny the Petition for Review.

## V. CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court deny Centennial's Petition for Review.

Dated this 24<sup>th</sup> day of December, 2008.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I, Becky Niesen, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, 1201 Pacific Avenue, Suite 2100, Tacoma, Washington 98401, attorneys for Appellants.

C. On this 24th day of December, 2008, I served a copy of the attached brief upon the following:

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